SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 175.

GEORGE SCHLOSSER, PLAINTIFF IN ERROR,

vs.

W. L. HEMPHILL, RICHARD RYAN, AND PALO ALTO COUNTY, IOWA.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

THE PLEADINGS.

This is a suit in equity brought by the plaintiff below, plaintiff in error here. In his petition he claims that he—

"Is the absolute owner in fee simple of lots 2 and 3 in section 30, township 97, range 34; that the said lots were surveyed by the Government and platted and the record of said survey and plats were duly returned to the General Land Office at Washington, D. C.; that said lots were meandered by the Government surveyor, and said meander lines run with reference to a lake then existing in part upon said section and the plat as made by said surveyor and filed for record as aforesaid, shows the meander line to coincide with the shore line of the said lake and shows no reservation be-

tween said meander line and the lake; that subsequent to the filing of said survey the United States sold said land and issued patent thereto to John A. Anthony; that the Government had platted and sold said lots without any reservation between the meander line and the lake; that the plaintiff's title includes all of the land embodied in the south half of said section, and his title is complete to all of said land claimed adversely by the defendants."

The plaintiff prays:

"That in the event the court should determine the plaintiff is not the owner of all the land included in the south half of said section that the court then determine the extent of the boundary of the plaintiff's land and that the court decree that the plaintiff is the fee-simple owner of all the land between the meander line and the bank and edge of the lake as meandered, as well as the land between the meander line of section 30, and that title be quieted in the plaintiff."

To the plaintiff's petition the defendant Ryan answered as follows:

"This defendant denies each and every allegation in plaintiff's petition not hereinafter specifically admitted; as to whether the Government issued patents to lots 2 and 3, and the plaintiff is the owner of said land the defendant asks the court to require strict proof; as to whether said lots were surveyed and platted by the Government and said survey and plats filed in the General Land Office and as to whether said lots were meandered defendant has not sufficient knowledge to form a belief, and denies the same; the defendant denies that such meander lines were run with reference to a lake then existing in part upon section 30, township 97, range 34. Defendant states that lots 2 and 3 of said section contain 99.80 acres, as shown by the Government survey and plats of said lots; that the patent from the United States and the warranty deeds as set forth in plaintiff's petition in describing said land only purported to convey the number of acres in each lot as shown by the Government survey and plats, and that neither said patent nor deeds purport in any manner to convey the land embraced in lots 12 and 13, being a part of the land in controversy,

and defendant denies that said patent or deeds conveyed any title whatever to the land embraced in lots 12 and 13. Defendant states that on the 8th day of March, 1898, the Secretary of the Interior directed the Commissioner of the General Land Office to cause to be surveyed certain unsurveyed land in sections 19–20–29 and 30, township 97, range 34, and sections 25, 36, township 97, range 35—that said survey was made—that there were surveyed 1,230 acres of land in the aforesaid sections; that the plat of said survey and the subdivisions of said 1,230 acres of land, together with field-notes, were duly made by said surveyor and filed in the General Land Office at Washington, D. C., in accordance with law; the land so surveyed became subject to disposal under the laws of the United States—under the direction of the Secretary of the Interior the register of the United States land office at Des Moines, Iowa, published notice as required by law that said 1,230 acres of land would be open to entry on the 30th day of August, 1898; that prior to the 30th day of August, 1898, defendant had established his residence upon lots 12 and 13 of said section, and on the 30th day of August, 1898, he filed his written application to enter the land embraced in said lots as a homestead—paid the required fees and commission to the receiver of said land office; his entry was allowed and became of record, and that said entry is now of record and in full force and effect, and the defendant is now engaged in living upon, cultivating and improving the land embraced in his homestead entry, being a part of the land plaintiff seeks in his petition to have title decreed in plaintiff—the defendant states that this court has no jurisdiction over the subject-matter of this suit; that is over lots 12 and 13 of said section for the reason that the legal title to the land embraced in said lots is in the Government of the United States, subject to the rights of this defendant to finish and complete his residence and cultivation of said lots, as required by the law."

The defendant Ryan further answering said:

"Defendant states that on the 30th day of August, 1898, the plaintiff, George Schlosser, recognizing the validity of the survey made in the year 1898, as herein set forth, filed

application to enter lots 13 and 14 of said section, being a part of the land in controversy, as an adjoining farm homestead; that his application was rejected by the register and receiver, notice of which was served on the plaintiff; that thereupon said Schlosser filed in said land office a contest against the homestead entry of this defendant; that a trial was had before the register and receiver upon the contest brought by the plaintiff, the plaintiff and this defendant appearing thereto; the register and receiver rendered their decision in favor of this defendant; within the time allowed for appeal the plaintiff, George Schlosser, appealed from said decision; that upon said appeal the said case is now pending before the Commissioner of the General Land Office at Washington, D. C.; that no decision thereon has been had. Certified copy of docket entry of said case is hereto attached marked Exhibit 'G,' and made a part hereof. Wherefore, the defendant prays that the court will require plaintiff to reply to the allegation of this defendant's answer as set forth in Exhibits A to G, inclusive, and that upon the admission of the plaintiff of the truth of said facts or upon the proof of the allegations contained in said exhibits the court will dismiss the plaintiff's bill for want of jurisdiction, and that the plaintiff's petition may be dismissed with costs against the plaintiff and for general relief."

The defendants Palo Alto County and W. L. Hemphill file the following joint answer:

"(As to lots 2 and 3, and the Government survey mentioned in plaintiff's petition; as to survey made under authority of the decision of the Secretary of the Interior of March 8, 1898, mentioned in the answer of Richard T. Ryan, the answer of these defendants is identical with that of Richard T. Ryan.) For further answer these defendants state that lots 11, 14 and 15 of section 30, T. 97, R. 34, as shown by the Government survey made from the 2d to the 20th day of April, inclusive, for the year 1898, is swamp and overflowed lands and was included in the grant of September 28, 1850, to the State of Iowa, made by the Government of the United States wherein all the swamp and overflowed land in the State of Iowa was granted to the State of Iowa and said lots were included in the grant of the legislature of the State

of Iowa wherein all swamp and overflowed land in Palo Alto county was granted to Palo Alto county. And that the defendant, W. L. Hemphill, has purchased from said county said lots, and has paid a part of the purchase price therefor; that the legal title to said lots remains in the United States as patent has not yet issued; that the equitable title is in Palo Alto county subject to a contract of sale of defendant, Hemphill; that on the 30th day of August, 1898, said county by its duly authorized swamp-land agent selected said lots as swamp and overflowed land and filed such selection in the United States land office at Des Moines, Iowa; that on the same day the plaintiff herein made application to enter said lot 14 as an adjoining farm homestead, his said application being filed in the United States land office at Des Moines, Iowa; that by order of the register and receiver of said land office a trial was had before said officers, of which the plaintiff herein had notice; that said officers rendered their joint decision, holding each of said lots to be swamp and overflowed land and approving the same to the State of Iowa and Palo Alto county; that said decision was forwarded to the Commissioner of the General Land Office on appeal of the plaintiff herein; that the Commissioner of the General Land Office affirmed the decision of the register and receiver; that thereafter the Secretary of the Interior affirmed the decision of the Commissioner and has approved each of said lots for patent; that there only remains the ministerial act of preparing and executing the patent from the Government of the United States to the State of Iowa, and from the State of Iowa to Palo Alto county to establish the legal title in said county. These defendants deny that this court has jurisdiction over the subject-matter of this suit. Wherefore, the defendants pray that the petition of the plaintiff be dismissed and judgment rendered against the plaintiff for costs and for general relief."

For the answers in full see Record, pages 2–7 and pages 9 and 10; also page 98.

DECISION.

The trial court having found in favor of the plaintiff, quieting title in him, the case was appealed to the supreme court of the State of Iowa; and on the third day of June, 1902, that court rendered its decision reversing the trial court in part, as follows:

"Lots 2 and 3 which plaintiff admittedly owns, are bounded on the south by the south section line and they extend almost across said section from east to west. Plaintiff's claim was once before presented to this court in an action of a similar nature to this, but against a different defendant. See Schlosser *vs.* Cruickshank, 96 Iowa, 414. Plaintiff was then successful. But that was before the resurvey and issuance of a patent and the making of conveyance by the county—it is undisputed that the meander line did not correctly indicate the shore line of the lake, as it was originally run. In such a case if the meander line does not coincide with the bank of the lake, but is so run that land lies outside and between it and the shore, the adjoining owner will usually take title to the actual shore line. And it may doubtless be properly conceded that no subsequent resurvey by the Government in the absence of fraud or error so gross as to be in the nature of a fraud in the original survey, could affect his title thereto.

"Mitchell & Smale, 140 U. S., 819.

"But where there is no adjacent body of water proper to be meandered the rule we have mentioned will not apply. In such a case the meander line will be a boundary line, and one who purchases from the Government according thereto cannot claim title beyond it. Grant *vs.* Hemphill, 92 Iowa, 218; French-Glen L. S. Co. *vs.* Springer, 22 S. C. Rep., 563.

"We have then to determine whether there was a body of water in section 30, proper to be meandered. As to what bodies of water should be meandered see Lester's Land Laws (ed. 1860), 714. We do not intend setting out the testimony on this point. It is quite voluminous and very conflicting. From a careful reading of it we reach the con-

clusion there was no such body of water. That there was swampy and low land in section 30 north of plaintiff's lots admits of no question, and in wet seasons doubtless a large part of it was covered at times with water, but we are equally clear that no permanent body of water of any considerable extent existed there. The lake spoken of in Schlosser *vs.* Cruickshank, as being about two miles wide, three miles long and 10 to 18 feet deep and adjacent to this land is evidently Lost Island lake, which lies south of section 30 and nowhere touches it. The meandered lake which gives rise to this controversy is called Mud lake and, as must be manifest from what we have said, lies north of plaintiff's land. How far, if at all, this mistake affected the conclusion in the Cruickshank case, we are not able to say, but that it was an error is clear from the fact that neither witnesses or counsel for plaintiff claim Mud lake to answer at all to the description so given. The confusion seems to have arisen from the fact that the Cruickshank case was submitted in connection with another case involving similar questions—Caldwell *vs.* Jackson—but which related to land bordering upon Lost Island lake, and the arguments were made in the latter case. If we were able to find now, as was done in the former action brought by this plaintiff, that a tract of land lay north of and between the meander line and an existing permanent lake proper to have been meandered, we might perhaps reach a conclusion on the facts in harmony with our former opinion, but the evidence before us precludes this. The south shore of the body of water such as it was is far south of the half section line according to all the testimony. Beyond this shore or margin plaintiff's title could not extend if that body of water was a permanent lake.

"Rood & Wallace, 109 Iowa, 51.

"Noyes *vs.* Board of Supervisors, etc., 104 *id.*, 174.

"Plaintiff's present claim and the facts and arguments in its support tend to clear the half section in question of any lake, and, indeed, to remove such permanent body of water wholly from the map. We are further inclined to believe that when the meander line deviates so far from the true shore as it does in this case, from the bank of the body of water attempted to be bounded according to all the evidence,

and the concessions of counsel, the error would be so gross as to warrant a re-survey.

"Cragin *vs.* Powell, 128 U. S., 691.
"Mich. L. L. Co. *vs.* Rust, 168 *id.*, 589.
"Niles & Cedar Point Club, 175 *id.*, 300.

"While it is true the significant question before us is the condition that existed when the original survey was made, and that attempts to show this must usually involve much uncertainty because of the great changes that lapse of time and cultivation of surrounding lands have made in the wet lands and inland waters, yet it appears beyond question here that the meander line was not correctly run in the first instance, and we think it is satisfactorily disclosed that no body of water necessary to be meandered then existed where Mud lake is shown on the plat to be." "Reversed."

Schlosser *vs.* Hemphill (case at bar).

STATEMENT OF FACTS.

The Government patent under which plaintiff claims title conveyed lots numbered 2 and 3 of section 30, township 97, range 34, and the plat and field-notes of the survey under which said patent was issued, as well as the patent, all recite the fact that the land disposed of by the patent was "ninety-nine acres and eighty-hundredths of an acre (excess paid as per receiver's receipt No. 2213)."

All of the deeds of conveyance from the original patentee to the plaintiff recite the number of acres conveyed to be ninety-nine acres and eighty-hundredths of an acre, the same as the patent from the Government did. The land was entered by the original patentee under the homestead law. Being within railroad limits, the entryman could not enter, under the homestead law, to exceed eighty acres, but could, by paying the Government price of $2.50 an acre for the excess, receive a patent for a fractional subdivision of less than forty acres in addition to the eighty he could enter.

There is no dispute in the case but what the plaintiff has

title to lots 2 and 3, containing ninety-nine and eighty one-hundredths acres.

WAS A MISTAKE MADE IN THE ORIGINAL GOVERNMENT SURVEY IN THE RUNNING OF THE MEANDER LINES ALONG THE NORTH SIDE OF PLAINTIFF'S LOTS NOS. 2 AND 3.

Plaintiff's Exhibit F, on page 11 of Record, shows the meandering lines of the original Government survey of what is known as Lost Island lake. It discloses that, according to the original meander line, Lost Island lake embraced substantially all of section 31, the section south of the land in controversy, all of section 30 save a small lot, No. 1, and lots 2 and 3, now owned by plaintiff, a large portion of section 29, a portion of section 20, and the major portion of section 19. According to the original meander lines, the lake was more than five miles in length.

Defendants' Exhibit 2, page 73 of Record, is the plat made by a second survey of the land, which survey was made in 1898, when all of the land originally meandered as being a part of Lost Island lake and situated in sections 30, 29, 20, and 19 was surveyed, platted, and disposed of. The number of acres thus surveyed and platted was 1,230 acres. As to the authentication of this survey and plat, see Exhibits 2, 24, 25, 26, 27, and 28, found on pages 73 to 77, inclusive, of Record.

Defendants' Exhibit 21, found on page 44 of Record, is a plat or survey made by J. T. Painter, which plat accompanied the application for survey upon which the Secretary of the Interior based his action in ordering the survey of 1898. On page 41 of Record counsel for plaintiff below (in order to save time) conceded that Mr. Painter would testify to the levels as taken and shown by his figures on plat, Exhibit 21, and that the plat should be taken as his full testimony as to such levels. Upon an examination of plat, Exhibit 21, we find, from the numerous levels taken on the

land originally meandered as a part of Lost Island lake, the land to be from 1.28 feet to 49 feet above the level of the waters of the slough or inlet to Trumbull lake, which slough or inlet is situated on section 30, and is the so-called lake plaintiff in error bases his riparian ownership claims upon.

Defendants' Exhibit 4, page 39 of Record, and the testimony of Mr. Moore on page 35 of Record, show a number of levels taken by Mr. Moore on the south half of section 30, being the land here in controversy, with reference to the waters of Lost Island lake. Mr. Moore's No. 1 on Exhibit 4 commences at the water's level of Lost Island lake. He then takes 26 levels, 24 of which are taken on the land in controversy, 26 on the banks of Lost Island lake, and 27 is again the level of Lost Island lake. These levels show that the land in controversy is from 1 to 24 feet above the waters of Lost Island lake.

Upon these facts as to the condition of the land being presented to the Secretary of the Interior, that officer, on the 8th day of March, 1898, directed the Commissioner of the General Land Office to make an examination of the land.

The Secretary's decision was in part as follows:

"By your office letter dated January 26th, 1898, you transmitted for departmental consideration application for survey of certain lands situated in sections 19, 20, 29, and 30, township 97, range 34. The application appears to have been served upon the owners for the lots bordering upon the lake. The applicants allege that meandering lines of said lake are wholly wrong; that the line established as a meandering line through sections 19 and 30, was from sixteen to forty-nine feet above high-water mark of said lake. That the meandering line on sections 20 and 29 is from thirteen to twenty-nine feet above high-water mark of the lake. That from the configuration of said land, there is not now, and was not at the time of the official survey, any reason or facts that could possibly be construed as justifying the meandering lines as established. From the official plat of said township it appears that the lake extends into four townships, viz: townships 96 and 97, ranges 34 and

35, is about five and a half miles long, and from a half a mile to a mile and a half in width. The case of Grant *vs.* Hemphill, 92 Iowa, 218, is cited in brief of the counsel for the plaintiffs; which involves the greater part of section 19; wherein it was held by the supreme court of Iowa that the land 'is not now, and probably never was any part of a lake.' In Noyes *vs.* Collins, 92 Iowa, 566, the supreme court of Iowa held that the title of riparian owners does not extend beyond the natural shore. In view of the showing made and the decisions of the supreme court, it is deemed proper to institute an inquiry into the facts. You are, therefore, directed to send a special agent to the locality to make special examination into the land in question, the position of the lake, past and present, and submit his report, when made, to the Department."

The Commissioner of the General Land Office, in obedience to instructions above quoted, detailed A. W. Barber, special clerk and surveyor of the Land Department, to make the examination which resulted in the second survey, as shown by plat, Plaintiff's Exhibit 2, page 73 of Record, and field-notes accompanying said plat, shown by Exhibit 31, page 80 of Record.

Upon the filing of the plat and field-notes made by Barber with the Commissioner of the General Land Office that officer transmitted the same to the Secretary of the Interior, and on the 25th day of June, 1898, said plat and field-notes were approved by the Secretary of the Interior, as shown by Defendants' Exhibit 26, which is in part as follows:

"March 8th, 1898, you were directed to send a special agent to the locality in question to make examination relative to the Government survey of land in the State of Iowa, situated in sections 19, 20, 29 and 30, township 97, range 34. On the request of your office, the Department, March 17th, 1898, detailed Amherst W. Barber to make the examination and survey. In your letter of June 13th, 1898, you transmit the report of Mr. Barber, dated April 2nd, 1898. Mr. Barber states that he has arrived at the conclusion that the land in sections 19, 20, 29 and 30, township 97, range 34, and a portion of the land in sections 25 and 36, township 97, range

35, were erroneously returned by the deputy surveyor in 1855, as covered by lakes. That there is no reasonable doubt that the pretended meandering of the lake was improper and almost wholly fictitious; and that the land should be surveyed and disposed of as public land. With his report Mr. Barber submitted a plat showing that the land in question is mostly agricultural in character, with a wet, marshy pond, called Mud lake, covering portions of sections 25 and 30, with an outlet going west into Trumbull lake. He also shows that there is a body of deep water in sections 31 and 32, township 97, range 34, separated from the land to the north by a sand ridge twelve feet high. From his report, it appears that there has been surveyed by him 1,230 acres additional, 533.71 acres as swamp land, the remainder farming land. I see no reason why the survey executed by Barber should not be approved, and the land disposed of as Government land."

See Transcript of Record, pages 74, 75.

It will thus be seen that the second survey was executed under the direction of the Secretary of the Interior upon notice to all alleged riparian owners upon a full investigation made by the Interior Department, and that all the land in controversy herein was found by the Interior Department to be land and not lake. It was found by that Department that the original survey of the township wherein the land in controversy is situated and the meandering of Lost Island lake was entirely erroneous; that the meander lines as run in said original survey on sections 30, 29, 20, and 19 were run without reference to any bodies of water.

The supreme court of the State of Iowa, upon the trial of this case and upon the consideration of a vast amount of testimony which we do not at this time set out, found as a matter of fact that there was no lake upon which to base the meander lines run on section 30 along the north side of the plaintiff's lots 2 and 3 nor upon sections 29, 20, and 19; that all of the land embraced within said meander lines was in fact land and not lake.

ASSIGNMENT OF ERRORS.

The plaintiff in error has assigned in his written brief eighteen errors. As shown by the record, there were but ten errors assigned when the writ of error was first sued out in the supreme court of the State of Iowa (pages 130–131, Record). However, all of the errors assigned by the plaintiff may be summed up as follows:

That under the laws and statutes and decisions of the United States a meander line is not a boundary line of lots sold by the United States, but is run for the purpose of conforming to the irregularities and sinuosities of creeks and lakes for the purpose of ascertaining the amount of land for which the Government charged on the sale thereof; that the supreme court of Iowa erred in holding that at the time of the original Government survey there was no lake adjacent to plaintiff's land proper to be meandered, and that the meander line was incorrectly run.

POINTS OF LAW.

The plaintiff in error claims title to the south half of section 30 under and by virtue of his patent to lots 2 and 3, conveying 99.80 acres, his contention being that as riparian owner he is entitled to the entire south half of section 30. In other words, that by reason of a patent issued under the homestead law, wherein he could only enter eighty acres of land, he obtained title to 320 acres. He bases this claim upon the fact that the original survey shows that a lake lay north of the meandered lines of plaintiff's lots.

The defendants claim that a mistake was made in the original survey made by the Government; that there was not at the time of the original survey any body of water lying north of section 31, in township 97, range 34, upon which to base the meandered line run along the north of plaintiff's lots 2 and 3, in section 30, and that the original survey erroneously

omitted from the surveyed lands 1,230 acres, of which all the land in controvery is a part.

The court below found, as a matter of fact, that there was no lake on section 30, 29, 20, or 19 on which to base the meander lines run through said section, but that all the land embraced within the meander lines run by the Government surveyor was land and not a lake.

THE NEW SURVEY.

1. Has the Secretary of the Interior authority to inquire into the facts for the purpose of determining whether a mistake was made in a Government survey?

2. If the Secretary of the Interior has the power to inquire into the facts, has he the authority to determine the question of whether a mistake was made; and if he has such authority, has he the authority to correct such mistake and to resurvey lands improperly omitted from the original survey?

3. If the Secretary of the Interior has authority to inquire into the facts and determine whether a mistake has been made in a survey, and has the authority to correct such mistake if he finds one has been made, and has the authority to resurvey lands improperly omitted by the first survey, what effect does his action in determining that a mistake did exist and in correcting the mistake and in surveying the land omitted by the original survey have upon the question of jurisdiction of the courts?

The defendants in error contend that the findings of the Land Department are unassailable in a collateral proceeding when, as in the case at bar, the Land Department has acted upon an application properly presented, assailing the correctness of the survey already made. We claim that the second inquiry in this case was a judicial inquiry

made upon notice served upon the plaintiff in error, and after a full investigation of all the facts in the case, and that the Secretary of the Interior, under such circumstances, having found that the original survey was a mistake and omitted 1,230 acres of land from the public domain and caused a new survey to be made, his findings and decisions are conclusive as to all questions involved in this case.

The decisions of this court upon this question are very persuasive as to the position of the defendants in error. We call attention to the language of this court in the case of Creegan *vs.* Powell:

"The mistakes and abuses which have crept into the official surveys of the public domain form a fruitful theme of complaint. The correction of these mistakes has not been delegated to the judiciary. From the earliest days matters appertaining to the survey of public or private lands have devolved upon the Commissioner of the General Land Office under the supervision of the Secretary of the Interior. The Commissioner is clothed with large powers of control to prevent the consequences of inadvertence, mistakes, irregularities and fraud in their operations. Under the authority of specific appropriations by Congress, for that purpose, the resurvey of public lands has become an extensive branch of the business of the General Land Office. * * * That the power to make and correct surveys of the public lands belongs to the political department of the Government, and that, whilst the lands are subject to the supervision of the General Land Office, the decisions of that bureau in all such cases like that of other special tribunals upon matters within their jurisdiction, are unassailable by the courts, except by direct proceeding; and that the latter, have no concurrent or original power to make similar corrections, if not an elementary principle of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient."

Cragin *vs.* Powell, 128 U. S., 691 (L. C. P., 32, 566).

How and by whom is the question of what lies beyond the meander line of plaintiff in error's lots to be determined?

The defendants in error say that the Secretary of the In-

terior is a special judicial tribunal created for the purpose of determining such questions. In discussing the question of the jurisdiction of the Secretary of the Interior, this court has said:

"This jurisdiction extends to the ordering of new surveys whenever, in the judgment of the Department, there has been error or fraud in the survey already made."
Michigan L. L. Co. *vs.* Rust, 168 U. S., 589.

Again, this court has declared:

"If the Department was not satisfied with this survey, there was no rule of law standing in its way from ordering another."
New Orleans *vs.* Payne, 147 U. S., 361.

Another case in point is the case of Niles *vs.* The Cedar Point Club, where the controversy was between two claimants of land occupying the relative positions of the plaintiff and defendants in error in this case; one claiming title under a patent from the United States issued under a second survey, occupying the position of the defendants in error in this case; the other party to the litigation claiming title to the land by virtue of it lying between the meander line of land which he had bought from the Government and the banks of a navigable body of water. The case was tried in the lower court upon the following agreed statement of facts:

"In 1834 and 1835, Ambrose Rice, a deputy surveyor, surveyed township 9, R. 9, and T. 10, R. 10, the same being the northern part of Ohio and adjacent to Lake Erie. He run a meander line some distance from the main body of Lake Erie. The description in the field-notes of the meander line being designated 'Flag marsh' and 'Impassable marsh and water.' The lots along the meander line were platted, and in 1844 the fractional lots bordering on the meander line were patented to Margeret Bailey. The appellant held title under these patents as a grantee of Margeret Bailey. The patents each recited the number of acres granted. In 1881, J. B. Marston under instructions

from the General Land Office surveyed and subdivided the land between the meander line as run by Rice and the bank of Lake Erie, being the land designated by Rice as 'Impassable marsh and water.' The field-notes of this last survey were approved by the Land Department. Thereafter the land was patented by the United States, and the title thus conveyed is now owned by the appellee. The condition of the so-called 'Impassable marsh' or water was stipulated to be as follows: Covered with a deep marsh of grass, canes or reeds, wild rice, etc., some of which are mown for a kind of coarse hay, other parts filled with bogs and pond holes and do not dry in summer, without any well-defined channel. The drainage was across the marsh and the lake. In heavy gales of wind it was subject to inundation from the lake. In discussing the question involved in this case the supreme court says:

"'It may be that Surveyor Rice erred in not extending his survey into the marsh, but his error does not enlarge the title conveyed to the surveyed fractional sections. The United States sold only the fractional sections, and one receiving a patent will not ordinarily be heard to insist that by reason of an error on the part of the surveyor more land was bought than was paid for or than the Government was offering for sale. * * * Rice should have extended his survey to the shores of Lake Erie, but he did not do it. He stopped at the borders of the marsh, and the Land Department approved his action. He evidently thought the marsh was to be treated as a body of water. A conclusion not unwarranted, but a conclusion which other findings show was not correct. * * * But it is urged that the fact that a meander line was run amounts to a determination by the Land Department that the fractional sections bordered upon a body of water, and that, therefore, the purchasers of these fractional sections were entitled to the riparian rights. But there is no such magic in a meander line; all that can be said of it is that it is an irregular line which bounds a body of land, and beyond that boundary there may be found forest or prairie, land or water, Government or Indian reservation.'"

Niles vs. Cedar Point Club, 175 U. S., 299 (44, 171).

There is a long and unbroken line of decisions of this court which hold that the Secretary of the Interior has juris-

diction to determine questions pertaining to surveys and resurveys and has jurisdiction to correct mistakes in surveys, and that when he has determined these questions his finding, in the absence of fraud, is absolutely conclusive upon the courts; and fraud will never be presumed, but must be clearly plead and proven. The officers of the Government are presumed to have done their full duty, and this presumption applies in all its force. Wrongful action on the part of the land officers is never presumed. There must be clear proof in support of these contentions.

Johnson *vs.* Townsley, 31 Wal., 72 (80 U. S., 20, 485).
Warner *vs.* Van Brunt, 19 Wal., 646 (86 U. S., 22, 219).
Shepley *vs.* Cowan, 91 U. S., 330 (23, 424).
Moore *vs.* Robbins, 86 U. S., 530 (24, 848).
U. S. *vs.* San Jacinto Tin Co., 125 U. S., 272.
Minter *vs.* Crommelin, 18 How. (U. S.), 87.
Colorado Coal Co. *vs.* U. S., 123 U. S., 307.
U. S. *vs.* Marshall Silver Mine Co., 129, 579.
U. S. *vs.* San Jacinto Tin Co., 125 U. S., 273.
Stringer *vs.* Young, 3 Pet. (U. S.), 320.
Patterson *vs.* Jenke, 2 Pet. (U. S.), 216.

Granting that a court of equity may set aside a patent issued by the Government in cases of fraud and mistake, such action can only be had when the pleadings in the case contain clear, specific averments of fraud, which averments must be supported by clear, satisfactory proof. Every case written on this subject holds that the fraud or mistake must be plead, and must clearly and distinctly be established by satisfactory proof.

U. S. *vs.* Maxwell Land Grant Co., 121 U. S., 325; 122 U. S., 365.
Colorado Coal Co. *vs.* U. S., 123 U. S., 307.
U. S. *vs.* Atherton, 102 U. S., 372.
Vance *vs.* Burbond, 101 U. S., 514.
U. S. *vs.* Hancock, 133 U. S., 193.

And in this connection it is well to note that it is only when fraud, imposition and perjury have prevented a party from fully prosecuting his case, or the land officers from fully considering it, that a court of equity will re-examine it and pass upon the questions of fact decided by the Land Department. It must appear that such fraud affected, entered into and controlled the determination of the Land Department. In the case at bar the Land Department has acted. It has said there was a mistake in the original Government survey. It has corrected that mistake, surveyed 1,230 acres of land omitted from the survey of the public domain by reason of that mistake, and there is not in this case one line of pleading or one scintilla of evidence that the plaintiff in error has not had full, fair and complete opportunity to present his claims to the Land Department. The record discloses that he did so present his claims, and that the decisions of that department were against him.

See Exhibits 29, 30, 32, and 33, pages 77 and 78 of the Record.

That the original Government survey which meandered the lakes known as Lost Island lake, Round lake, and Trumbull lake, situated in the township in which the land in controversy is located and the two adjoining townships, was a fraud, and omitted some 3,000 acres of land from such surveys by placing them within the meander lines of said lakes, is so well established by the decisions of the Interior Department and the supreme court of the State of Iowa as to admit of no controversy. The mistake was judicially declared to exist in the case of Grant *vs.* Hemphill, which went up from Palo Alto county to the supreme court of the State on a suit brought by riparian owners against Hemphill and others, the supreme court of the State of Iowa held that the land in controvery in that case being part of the land resurveyed with the land here involved "was a part of the unsurveyed public domain to which no

one could obtain title except through the regular channels adopted by the Government of the United States for the disposition of public lands."

Grant *vs.* Hemphill, 92 Iowa, 218.
Hemphill Case, 26 Land Decision, 319.
Hemphill Case, 27 Land Decision, 119.
McClennan Case, 29 Land Decision, 514.
Chapman Case. (See Dec. Feb. 28, 1900, not reported.)
McClennan Case, 30 Land Decision, 527.
Schlosser *vs.* Hemphill, — Iowa, — (case at bar).

The decisions of the Secretary of the Interior, just cited, were not *ex parte*, but were rendered upon a full investigation of the alleged mistake and fraud in the original survey. This being true, his decisions on the questions of fact are conclusive and, upon questions of law, entitled to great weight.

The decision of the Secretary, so far as the land in controversy is concerned, is found on pages 74 to 76, inclusive, of Record (Def'ts' Ex. 25 and 26). We here set out the decision of the Secretary ordering a survey of the 900 acres of land omitted from the original survey on the south of Lost Island lake. The records of this case and the General Land Office disclose that Lost Island lake is situated almost wholly upon section 31 of T. 97, R. 34. The original survey, however, placed with the meander lines of the lake 1,230 acres of land lying north of the lake, in sections 30, 29, 20, and 19 of T. 97, R. 34; also some 900 acres of land lying southwest of the lake, in sections 1, 2, 11, 12, 13, and 14, T. 96, R. 34. The following quotations are taken from the decision of the Secretary of the Interior involving the last described land:

Secretary Hitchcock to the Commissioner of the General Land Office, February 17, 1900. (W.V. D.) (W.C.P.)

"John McClennen and Moses L. Pruitt and Clay County, Iowa, have presented applications for the survey of certain lands in said county, amounting to about eight hundred acres, which it is alleged have never been surveyed and are represented by the Government survey of lands in that vicinity and by the plats made therefrom as a lake. Protests against these applications were presented by adjacent owners and the matter was submitted to the department by your office letter of April 7, 1899, for instructions in the premises.

"The township in which it is alleged this unsurveyed land is, being T. 96 N., R. 35 W., Iowa, was surveyed in 1855 and 1856, and that survey and the map made from the field notes thereof represented parts of sections 1, 2, 11, 12, 13 and 14, as a lake. A meander line was run, indicating the extent of the alleged body of water, and the tracts rendered fractional thereby have all been disposed of by the United States. This meander line starts from a point near the half-mile corner on the east line of section 1, runs thence in a southwesterly direction to a point in section 13 near the half-mile corner on the line between sections 13 and 14, thence northwest to a point just west of the half-mile corner on the line between sections 11 and 14, and thence in a northeasterly direction to a point just east of the half-mile corner on the north line of section 1.

"The petitioners here have filed a map purporting to show the lake as it now actually is. According to this map the meander line starts at the same point as does the meander line shown upon the map of the Government survey. It runs thence in a southwesterly direction to a point somewhat less than a quarter of mile almost due south of the center of section 1; thence in a northerly direction to a point just north of the center of section 1; and thence in a northeasterly direction to the point on the north line of section 1 where the meander line shown by the Government survey ended. The starting points and the stopping points are the same in both cases.

"The applicants, McClennen and Pruitt, allege

"'that there never was a lake of water in said sections [1, 2, 11, 12, 13 and 14] and that the meander lines as set out by the Government survey, and as shown by the Government plats, is an absolute mistake, and that there is not now and never has been any lake or body of water on said sections of land upon which to base said meander lines;'

"that there is a lake in the adjoining township which borders on the N. E. ¼ of section 1, of the lands in question; that the configuration of the shores of said lake has not materially changed since the Government survey; that the meander lines of said survey are so surely wrong as to leave no doubt that a fraud was perpetrated in the making of said survey; that much of the land is high, dry and tillable land that would not have passed to the State as swamp land had it been properly surveyed; that McClennen has been residing upon and cultivating about one hundred and sixty acres of said unsurveyed land for fourteen years, and that Pruitt has been residing upon and cultivating about one hundred and twenty acres thereof for six years.

"With the papers is an affidavit of J. T. Painter, who says he made a survey of these lands and prepared the map filed as 'Exhibit 1.' He explains the map and certain photographs filed as exhibits and says:

"'I further depose and say that about two hundred acres of the land between the meander lines of the original survey, as shown on plat Ex. 1 is high hilly land; that a large portion of the balance of the said unsurveyed land would be termed as gentle rolling prairie land and that the remainder of said unsurveyed land would be of a swampy character.

"'I further depose and say that the meander lines as made by the Government surveyor, as shown in red ink on plat Ex. 1, are absolutely erroneous; that there never was a body of water upon which to base said meander line; that they are run over the tops of hills and along the sides of hills and it is my opinion that they were run on paper only and never were actually chained or surveyed.

"A joint affidavit of McClennen and Pruitt sets forth that the former is residing upon and cultivating a portion of the high dry land in sections 2, 11 and 12, and that Pruitt is residing upon and cultivating unsurveyed land in section 1, and concludes as follows:

"'We further depose and say that all the land resided upon and cultivated can be cultivated to crops in any season; that the same is very hilly and that it is impossible that the same was ever covered by the water from Lost Island lake, or that it was ever in a lake at all, and that its present condition is the same as it was when the original survey was made.'

"There are filed the affidavits of ten parties who claim to have known the land in question for from five to twenty-five years, each of whom says he has read the affidavits of Painter and McClennen and Pruitt and from his personal knowledge of the character of the lands knows the statements made therein are true.

"*With the petition are affidavits of five other persons, who say that they were acquainted with the surveyors who made the surveys of this township and other Government lands in Clay and Palo Alto counties, and that while making these surveys the men were frequently under the influence of liquor, and wholly unfit to properly perform that work.*

"Owners of adjacent lands were notified of the filing of these petitions and some of them have filed protests against the survey of the land in question as requested. None of these protests denies the statement that there is a large body of land within the meander lines as fixed by the Government survey of said township, nor alleges that said lines correctly, or approximately so, indicated any body of water as it existed at the time of said survey. They claim, as grantees of the tracts made fractional by said meander lines, the adjoining unsurveyed land.

"The question is as to the authority to survey these lands as Government lands, if the facts are as stated by the petitioners, and, hence, for the present these statements that the survey was erroneous and that a large portion of the space indicated thereby as water was in fact land that should have been surveyed, will be taken as true.

"The petitioners rely upon the decision of the supreme court of Iowa in the case of Grant *v.* Hemphill (92 Iowa, 218), in support of their contention, while the protestants refer to the decision of the same court in Schlosser *v.* Cruikshank (96 Iowa, 414), in support of their claims. These cases both involved land in the immediate neighborhood of that here in question. In Grant *v.* Hemphill it was found that there was no body of water anywhere on the land upon

which to base the meander line. The court recognized the rule that meander lines are run, in surveying the public lands, not as boundaries but for the purpose of defining the sinuosities of the body of water and as a means of determining the quantity of land in a tract made fractional by reason of bordering upon such body of water, but held that the rule did not apply in that case because there was no body of water to which the meander line could be referred.

* * * * * * *

"Has this Department, after the tracts designated by the survey as fractional because of bordering upon a body of water, have been disposed of, authority to examine as to the correctness of such survey and, if such examination demonstrates that there was no body of water to prevent the extension of the township, section or subdivisional lines and, that therefore the survey was incorrectly made, either through mistake or fraud, is there any authority to cause the lands omitted from such survey to be surveyed and disposed of as public lands?

"The authority to cause a survey to be made under such circumstances has not been denied by this Department, but the decisions so far as they go, tend to assert it. In the case of Archie G. Palmer (26 L. D., 24), application was made for the survey of an island in the Platte river, alleged to have been in existence at the date of the survey of public lands upon the bank of the river but not shown upon the plat of such survey, and the Department said:

"'But if it is a fact that there was in existence, at the date of the survey, an island in the locality described, above high-water mark and not subject to overflow and fit for agricultural purposes, containing about one hundred and twenty-five acres of land—more than three legal subdivisions—which was omitted from the survey of 1862, it may be that the island was omitted from the original survey through fraud or mistake, so that a survey should now be granted.'

"A hearing was ordered to ascertain the facts and upon consideration of the evidence adduced the application for survey was denied, it being held that there was nothing to indicate fraud or mistake. Archie G. Palmer (27 L. D., 380).

"In the case of W. L. Hemphill *et al.* (26 L. D., 319), the allegations made in support of the petition for a survey were

very similar to those made here and it was ordered that an inquiry be instituted to ascertain the facts. An employé of your office was detailed to make an investigation, who reported that the lands were erroneously returned as covered by a lake and that there was no reasonable doubt that the pretended meandering of a lake was improper and almost wholly fictitious. He made a survey of the lands and with his report submitted a plat based upon that survey. This Department concurred in the recommendation of your office that such survey should be approved and the land disposed of as Government lands (27 L. D., 119).

"In John J. Serry *et al.* (27 L. D., 330), the application for a survey of lands between the meander line and the actual water line was refused. In that decision it was said:

"'These lots were bought from the Government upon the faith of the statement that they had a water front and have for many years been bought and sold among individuals under the same conditions. If there be any power in this Department under such circumstances to disregard the former survey and make a new one that power would be exercised only in exceptional cases where the utmost disregard of rules and regulations and flagrant mistakes in the execution of the former survey were disclosed. No such condition is exhibited here. The land alleged to have been left between the meander line and the water was not of great extent and was of little value either present or prospective at the date of that survey.'

"The question presented here does not seem to have been directly involved in any decision of the Supreme Court of the United States, and hence no specific ruling therein is to be found.

"In Cragin *v.* Powell (128 U. S., 691), the court laid down several propositions which have a bearing upon the question now under consideration. It was said:

"'It is a well-settled principle that when lands are granted according to an official plat of the survey of such lands, the plat itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and controls so far as limits are concerned as if such descriptive features were written out upon the face of the deed or the grant itself.'

"As to the power of this Department over the survey of the public lands, it was said:

"'The mistakes and abuses which have crept into the official surveys of the public domain form a fruitful theme of complaint in the political branches of the Government. The correction of these mistakes and abuses has not been delegated to the judiciary except as provided by the act of June 14, 1860, 12 Stat., 33, c. 128, in relation to Mexican land claims, which was repealed in 1864, 13 Stat., 332, c. 194 sect. 8. From the earliest days matters appertaining to the survey of public or private lands have devolved upon the Commissioner of the General Land Office under the supervision of the Secretary of the Interior. Rev. Stat. 453. The Commissioner, in the exercise of his superintendence over surveyors general, and of all subordinate officers of his bureau is clothed with large powers of control to prevent the consequences of inadvertence, mistakes, irregularity and fraud in their operations. * * * That the power to make and correct surveys of the public lands belongs to the political department of the Government and that, whilst the lands are subject to the supervision of the General Land Office, the decision of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts except by a direct proceeding; and that the latter have no concurrent or original power to make similar corrections, if not an elementary principle of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient. * * *

"'It is conceded that this power of supervision and correction by the Commissioner of the General Land Office is subject to necessary and decided limitation. Nor is it denied that when the Land Department has once made and approved a governmental survey of public lands, (the plats all having been filed in the proper office,) and has sold or disposed of such lands, the courts have power to protect the private rights of a party who has purchased, in good faith, from the Government against the interferences or appropriations of corrective resurveys made by that Department subsequently to such disposition or sale.'

"In Hardin *v.* Jordan (140 U. S., 371), it was held that the rights of an owner of land bordering upon a body of water are to be determined by the law of the State in which they lie, that meander lines are run to mark the sinuosities of the water which forms the boundary and that the purchaser from the United States of a tract shown by the survey to

border on a body of water takes to the water's edge or to the center of the body of water, according to the law of the State. That case involved a narrow tongue of land which was not surveyed or shown upon the plat and as to this the court said (page 399):

"'As to the narrow tongue of land which, according to the finding of facts, projects into the lake from the north side, we do not think that it can have any effect upon the decision of this case. It does not appear to have extended far enough southerly, at least during high water, to be opposed to the property of the plaintiff. Besides, the plat of the lake and the land surrounding it, referred to in the patent granted to Holbrook, exhibits the various fractional sections surrounding the lake as immediately bordering upon it; and this, as shown by the authorities already cited, constitutes the lake itself the real boundary of the land, without regard to the meander line. There should be some extraordinary proof of mistake on the part of the surveyor in order to interfere with the passing of the land as riparian land.'

"This would seem to be a recognition of the fact that there might be a case where, because of mistake, lands adjacent to the fractional tract would not pass even though there was a body of water to which the survey lines might be referred.

"In Mitchell *v.* Smale (140 U. S., 406), the court reaffirmed the ruling in Jordan *v.* Hardin as to the effect of a patent around the margins of a lake, and that the water and not the meander line is the boundary but added the following:

"'We do not mean to say that, in running a pretended meander line, the surveyor may not make a plain and obvious mistake, or be guilty of an obvious fraud; in which case the Government would have the right to recall the survey, and have it corrected by the courts or in some other way. Cases have happended in which, by mistake, the meander line described by a surveyor in the field notes of his survey did not approach the water line intended to be portrayed. Such mistakes, of course, do not bind the Government.'

"In Horne *v.* Smith (159 U. S., 40), the official plat of survey showed sections 23 and 26 as fractional because of bordering on Indian river a meander line being run to mark such river. As a matter of fact the survey stopped short of the river the water meandered being that of a bayou instead of the river. The court held that there was simply an omis-

sion to make any survey of land between the bayou and the river, saying:

"'Although it was unsurveyed it does not follow that the patent for the surveyed tract adjoining carries with it the land which perhaps ought to have been, but which was not in fact, surveyed. The patent conveys only the land which is surveyed, and when it is clear from the plat and the surveys that the tract surveyed terminated at a particular body of water, the patent carries no land beyond it.'

"In this connection the court cited the case of Lammers v. Nissen (4 Neb., 245), as somewhat in point saying:

"'In that case it appeared that between the meander line as run and the Missouri river was a tract of several hundred acres, and the court held that as that body of land had not been surveyed it did not pass by a patent of a lot which on the Government plat extended to the meander line.'

"An examination of the decision in Lammers *v.* Nissen discloses that only a part of the meander line involved there was along a slough.

"If a mistake of a surveyor in establishing a meander line along a slough instead of upon the body of water called for by the survey may be corrected it would seem that a mistake in laying down such a line, where there was no body of water to base it on may also be corrected. If the Government is not bound in the one case there certainly is no good reason for holding it bound in the other. The theory upon which the courts and this Department have refused to interfere where there is a small body of land left between the meander line and the actual water line, is because it may be properly presumed that the purchaser took the land to secure the water front pertaining thereto and it would be an injustice to deprive him of that water front which is often the most valuable part of his purchase. This reason has, however, no applicability where there was in fact no water upon which to base a right. One purchasing a tract under such circumstances, might claim that he was misled by the representations made by the plat of survey but he could not claim that any right was taken from him if a survey should be made, after his purchase, of the land left unsurveyed, because of the mistake in the survey under which he bought. The reason for the rule having disappeared the rule itself has no force in such a case.

"If the allegations made in this case are true, the lines of

sections 2, 11, 12, 13 and 14 would not have intersected any body of water had they been extended to their full length. The persons who have acquired the fractional tracts in those sections would not, by a survey of the lands omitted from the former survey, be deprived of any benefits arising from a water front and ought not to be heard to complain that they would be deprived of land which they never paid for. They will still hold the full quantity of land which they bought. The same would be true as to a part of the subdivisional lines of section one, but it is impossible to determine now, the points at which such subdivisional lines would, if properly extended, intersect the body of water.

"It is not necessary to search for the source of the error. The result is the same whether such error arose from mistake, inadvertence, incompetency or fraud on the part of the men who made the former survey. A careful examination of the law, the precedents, furnished by the decisions of the courts and this Department, and the rights of both the Government and its grantees, leads irresistibly to the conclusion that this Department has authority, even after the tracts designated by Government survey as fractional by reason of bordering upon a body of water have been disposed of, to examine as to the correctness of such survey, and if that examination demonstrates that there was no body of water to prevent the extension of the township, section or subdivision lines to cause the lands thus erroneously omitted from survey to be surveyed and disposed of as public lands of the United States.

"The facts presented in support of this petition for survey, and not disputed, clearly indicate that a serious mistake was made in the survey of this township, and a new survey should now be made. Upon an inspection of the land that mistake and the serious inaccuracy in the Government survey were so obvious that no one could have been misled by the latter."

* * * * * * *

John McClennen case, 29 L. D., 514.

The report of the survey, together with the plat and field-notes made under directions of the decision of the Secretary just quoted, was before the Department for approval March

11, 1901. We quote from the decision of the Secretary approving the survey:

Secretary Hitchcock to the Commissioner of the General Land Office, March 11, 1901.
(W. V. D.) (E. F. B.)

"With your letter of January 15, 1901, you transmitted to the Department the papers pertaining to and including returns of survey of parts of sections 1, 2, 11, 12, 13 and 14, in township 96 N., R. 35 W., Iowa, executed by M. P. McCoy, examiner of surveys, in pursuance of directions contained in the decision of the Department of February 17, 1900 (29 L. D., 514), upon the application of John McClennen *et al.* Also the returns of survey of part of section 3, in township 96 N., R. 35 W., and parts of sections 22, 23, 26, 27, 34 and 35, in township 97 N., R. 35 W., Iowa, executed by the said M. P. McCoy under instructions issued upon the application of J. C. Chapman *et al.*, pursuant to directions contained in the letter of the Department of February 28, 1900 (unreported).

"You state that in compliance with instructions contained in said decision of February 17, 1900, the local officers retained in their office for thirty days copies of the unapproved plats of survey, giving notice to all parties in interest that said plats were there for the purpose of inspection, in order that they may have an opportunity to file any objections they might have to the approval of said surveys, and that at the expiration of thirty days the local officers reported that no objections to the approval of said plats of survey had been filed after due service of notice.

* * * * * * *

"The plat of survey of the lands in township 96 N., R. 35 W., covers parts of sections 1, 2, 11, 12, 13 and 14. On the plat of the original survey of 1856 said lands are represented as being covered by a body of water known as Lost Island lake. The returns of the survey under consideration show that the original meander lines do not approximate the true meander of the lake but traverse high, rolling prairie, from five to twenty feet above the level of the swamp, except near the outlet of the lake, where the swamp extends as much as half a mile outside the said original meanders, and the character of the land, as shown by said returns, indicates that there has been no material change in the lake since such

original survey. Thus the conclusion reached that this original survey was erroneous in that it did not include all the public lands in said townships subject to survey is sustained. You report that no objections have been filed against the approval of the survey of the lands in this township bordering on Lost Island lake and that said survey has been executed in strict accordance with the instructions.

"The only objections to the approval of the plat of survey of the lands in townships 96 and 97, R. 35 W., bordering on Round and Trumbull lakes, reported with your letter, is contained in a petition filed by W. W. Cornwall, swamp-land agent of the county of Clay, and J. C. Chapman, who request that the lines of survey be extended over said alleged bodies of water for the reason that the land embraced within the meander lines shown by the plat of survey is swamp and overflowed land which passed to the State of Iowa under the swamp-land grant.

"No objection to the survey is made by any one claiming as a riparian proprietor. The protestants, although they are owners of lands bordering on the meander line, do not claim under such right, but, on the contrary, deny that there are any riparian rights in the owners of lands bordering on the meander line of lakes or ponds in Iowa. They deny that there is a permanent body of water that prevents the extension of the lines of survey, and, hence, they protest against the meanderings of Round and Trumbull lakes, as such, when in fact as they allege the meander line is upon a body of swamp and overflowed land that was acquired by the State under the swamp-land grant, which inured to the county of Clay by virtue of the act of the legislature of Iowa, approved January 13, 1853, granting all the swamp and overflowed lands acquired under said grant to the counties, respectively, in which such lands are situated.

"With reference to this and similar claims, the governor of the State of Iowa has addressed a letter to this Department, under date of January 30, 1901, in which he says:

"'I am advised that a number of parties are seeking to have re-surveys made of portions of the area of this State that were originally meandered as lakes. I write to say that this State lays claim to all meandered lakebeds, and in behalf of the State I desire to make formal objection to any re-survey of these lands, unless requested by the governor of the State or some person duly appointed and authorized

to act. This does not apply to any particular tract, but to all portions of the State originally meandered.'

"By letter of February 26, 1901, he objects to the approval of these particular surveys upon the ground that the original surveys were correctly made and the bodies of water which were meandered at the time were in fact lakes and the shores of the same were correctly meandered by the original township survey; that upon the approval of said survey the title to the beds of the lakes, as meandered by said survey, vested in the State of Iowa by virtue of its sovereignty, and the United States has no authority to divest the State of its title to such lake beds by any resurvey thereof; that the grant by the State of Iowa to the several counties in said State, of the swamp and overflowed lands acquired by the State under the swamp-land grant, did not include any part of the beds of lakes to which the State claims title in its sovereign right and which can not be affected by any resurvey of said lands in the interest of the United States or of the several counties, or of any individual who may claim any title to or interest in said lake beds; and that if it is sought to establish the claim that an error was made in the meandering of these lakes by the original township survey, either upon the part of the United States, the counties in which such lakes are situated, or an individual, such attempt raises an issue of fact which can only be determined upon a hearing by the proper tribunal on sufficient notice, and the Department of the Interior is not the proper forum.

"The State does not dispute the title of the county to the swamp and overflowed lands that properly come within the grant of September 28, 1850, but it claims to be the owner of the lake beds in said State, not as grantee of the United States, but by virtue of its sovereignty. Nor does the United States dispute the title of the State to the beds of the lakes and streams in said State that were properly meandered by an approved township survey, or claim any authority to make a resurvey of lands that may have been formed since the survey by the recession or drying up of the waters of such lakes or streams. But the United States does not, by the approval of a survey, part with its title to lands that were erroneously omitted from survey. Such lands are Government lands. The power to make and correct surveys of the public lands belongs exclusively to the political de-

partment of the Government (Cragin *v.* Powell, 128 U. S., 691). The Secretary of the Interior, being charged with the supervision of the public lands, is the proper tribunal to determine whether the land in question was a part of the lake bed or was public land omitted from the survey (Knight *v.* Land Association, 142 U. S., 161; Rood *v.* Wallace, 79 N. W. Rep., 449). No affidavits have been filed in support of the allegation that the lakes were properly meandered by the original survey, and no reason is shown why the decision of the Department, of February 17, 1900, in the case of John McClennen, directing that the lands omitted from the former surveys be surveyed, should be disturbed.

"No question of law is presented by the petition of Chapman and Clay county which does, as held by you, constitute an objection to the approval of this survey in its present form. There is simply a question of fact as to whether Round and Trumbull lakes, as shown by the present survey, are bodies of water of such permanent nature as are required by the manual of instructions to be meandered. If they are, the surveys should be approved."

* * * * * * *

"No sufficient objections to the approval of said surveys having been filed, and it appearing that they have been executed in accordance with the instructions, you will approve the same, to the end that the lands may be disposed ofas public lands."

John McLennen Case, L. D., vol. 30, 527.

COMPETENCY OF ORAL TESTIMONY.

The plaintiff in error in this case attacks the homestead entry of Richard Ryan for lots 12 and 13. Ryan's entry at the time of the commencement of this action was of record in the United States land office, and the only thing lacking to complete his title was his compliance with the land law, and thereafter, the issuance of patent. The plaintiff also attacks the patents issued by the Government of the United States under the swamp-land grant and by the State of Iowa to Palo Alto county, and the conveyance from Palo Alto county to the defendant Hemphill, which patents and con-

veyance embrace lots 11, 14, and 15, which, together with lots 12 and 13, embrace all the land in controversy.

The plaintiff in error has sought to impeach the defendants' title under these conveyances from the United States by parol testimony. We submit that oral testimony is not competent to thus impeach the defendants' muniments of title in a collateral proceeding.

In support of this position we call attention to the decision of this court in the case of Knight *vs.* United States Land Association; and for a more complete understanding of the question involved in that case we quote from the decision at some length, showing the offer of oral testimony for the purpose of impeaching a patent issued under a second survey, which brings the case at bar clearly within the realm of this decision.

"Plaintiff offered in evidence the first survey made by Deputy Surveyor Stratton approved by the surveyor general of California, confirmed by the Commissioner of the General Land Office and also produced a witness who testified the premises were below the ordinary high water mark.

"Objected to because the survey had been cancelled and superseded by another survey in accordance with the instructions of the Secretary of the Interior.

"The defendant offered in evidence patent from the United States, also a plat of lands surveyed by Van Leicht under instructions of the United States surveyor general approved by the Commissioner of the General Land Office indorsed as follows:

"The field notes of the survey are strictly in accordance with the instructions of the Commissioner of November 27, 1883. W. H. H. Brown, surveyor general.

"Objected to because the first survey is the final adjudication of the land office of the location of the premises and the patent is void to the extent that it departs from the first survey.

"The court found the facts to be that the premises were below the high-water mark and were below and outside of the first survey made by Stratton, approved in 1868, but were within a subsequent survey approved in 1884, and

upon the finding of facts held that the last survey was illegal because in approving the prior survey the Commissioner of the General Land Office was acting in judicial capacity and his judgment is not reversible. The plaintiff claims the Stratton survey was correct and was never legally set aside, that the latter survey upon which defendant's patent issued was wholly unauthorized in law and was void."

The foregoing sufficiently states the facts in that case and it is seen that the case was almost exactly like the case at bar so far as the actions of the Land Department of the Government are concerned. After stating the facts the Supreme Court of the United States said :

"It is a well-settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of the Government and that the action of that department within the scope of its authority is unassailable in the courts except by direct proceeding. Under this rule it must be held that the action of the Land Department in determining that the Von Leicht survey correctly delineated the boundaries of the Pueblo grant, is binding in this court, if the Department had jurisdiction and power to order that survey."

After a very lengthy and exhaustive discussion of the duties and power of the Secretary of the Interior over surveys the Supreme Court uses these words:

"The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the Government, which is a party in interest in every case involving the surveying and disposal of the public lands. * * * We conclude that the Secretary of the Interior had ample power to set aside the Stratton survey and order a new survey by Von Leich and that his action in such matters is unassailable in the courts in a collateral proceeding. The Von Leich survey, therefore, must be held as a correct survey."

As to the question of the admission of parole evidence to show the land was below the ordinary high-water mark the court says:

"We think there was error in admitting evidence to show that the land was below high-water mark of the creek. The judgment should have been for the defendant. Knight *vs.* United States Land Association, 142 U. S., 116" (L. C. P. 35, 974).

By reason of the plaintiff in error's patent for ninety-nine and eighty one-hundredths of an acre he seeks to obtain title to 320 acres. In the case of Horn *vs.* Smith, Mr. Justice Brewer delivered the opinion of the court, and in the opinion we find the following language:

"The contention of the plaintiff is that inasmuch as this body of land is not shown upon the official plat, and although the boundaries and areas of the three lots are given, the latter aggregating only 170 acres, the patent for the lots conveys all the land to the main body of the river. In other words, a patent for 170 acres contains over 700. The basis of this contention is the familiar rule that a meander line is not a line of boundary, and that a patent for a tract of land bordering on a river conveys the land not simply to the meander line, but to the water line."

In this decision this court upheld an instruction which practically told the jury that where there was so much land lying beyond the meander line the familiar rule that a meander line is not a line of boundary did not apply.

Horn *vs.* Smith, 159 U. S., 40.

The question in the case of French Glen Livestock Company *vs.* Springer was as to whether, at the time of the survey and the establishing of a meander line, there was a lake upon which to base a meander line, being substantially the question we have in this case. It was urged that the fact that a meander line was run amounts to a determination by the Land Department that the surveyed

fractional sections bordered on a body of water. It was sought to have this court follow the rule announced in the case of Hardin *vs.* Jordan, 140 U. S., 384. But this court did not feel called upon to enter into that discussion, for the supreme court of Oregon reached its conclusions apart from any such question, holding that there never was a lake in front of plaintiff's lots, and that these issues of fact were clear and distinct, and, having been submitted and decided by the court below on the question of fact, this court affirmed the decision of the supreme court of Oregon.

French Glen Livestock Company *vs.* Springer, 185 U. S., 47.

In the case of The Security Land and Exploration Company *vs.* Burns the action was ejectment, commenced in the district court of St. Louis county, in the State of Minnesota, to recover certain lands in that county. The doctrine announced by this court was substantially that when the plat of a Government survey is the result of and founded upon a fraud, and when there is actually no lake near the spot indicated by the meandered lines, and where the result of holding to the general rule that meandered lines are not boundary lines, would be that the adjacent owner's title would be extended to embrace fourfold more land than he entered, the false meander line should be considered as a boundary line of the adjacent owner's land and not the bank of the body of water lying beyond. The court said :

" We think French Glen Livestock Company *vs.* Springer, 185 U. S., 47, is authority which calls for the affirmance of this judgment. In that case the plaintiff claimed under patents from the United States which referred to the official plats of the survey, and by which it appeared the township was rendered fractional by abutting upon the meander line along the south side of Malheur lake, which plat appeared to have been approved by the Land Department of the Government, and the plat showed the lots as bounded north by

the meander line of Malheur lake. The field-note of the survey of the exterior boundaries of the township and its subdivisions, and the meander line of Malheur lake itself, under the title headings 'Meanderings of the south shore of Malheur lake through fractional township 26' indicated that it was run with the meander of the lake. The plaintiff in that case claimed title to land which was just north of this meander line, on the ground that such land was a portion of the lake when the survey was made and the meander line run around it—the defendant disputed this claim, and asserted that when this survey was made and the plat thereof with its meander line was referred to in the patent, there was in fact no such lake anywhere near the spot, and the so-called meander line was in truth a line bounding plaintiff's land and limiting him thereby so that he could not go beyond it in order to find the lake which plaintiff claimed as a boundary."

In the case of The French Glen Livestock Company *vs.* Springer there was a lake in fact which would have been touched by the lines of the adjacent's owner's lots had those lines been extended to the banks of the lake. But as the lines thus extended would only have touched the lake at one place, and because it would have the effect of giving the adjacent owner title to three times as much land as he bought from the Government, this court held that the meander line in that case was a boundary line determining the amount of land the adjacent owner had purchased from the Government.

Counsel for plaintiff in error quotes decisions of the Iowa supreme court at some length in order to suggest to this court that the question of the title to the beds of lakes in Iowa has not yet been determined by the decisions of the supreme court of that State in so far as riparian owners are concerned, and therefore the common-law rule will apply, whereby, as is claimed, the riparian proprietor will take to the center of the lake. The decisions of the supreme court of the State of Iowa are perfectly clear on this proposition.

The decisions cited by counsel for plaintiff in error establish this question. But the doctrine contended for has no place in this case, because the supreme court of Iowa and the Secretary of the Interior have both determined that there was no lake upon which to base the meander lines. If there was no lake, there is no lake bed.

Dry lake was a meandered body of water seven miles long and about one mile in width, with a depth of three to seven feet. It was artificially drained and its bed surveyed by the county and sold, the deeds reciting the fact that the land was sold under the swamp-land grant. A suit was brought by a land-owner owning fractional pieces of land along the meandered line of Dry lake, claiming that as a riparian owner he owned the bed of the lake adjacent to his fractional lots. The suit was brought against the grantee of the county under the swamp-land grant. The supreme court of Iowa said:

"The rule that the title of riparian owners upon a natural lake or pond does not extend beyound the natural shore appears to be very generally, almost universally, recognized. Our views are in accord with this doctrine."

Noyes *vs.* Collins, 96 Iowa, 567.

In another case, involving exactly the same questions on the same lake, the supreme court of Iowa said:

"The rule that a riparian owner of land bordering on rivers or streams, in the absence of limitation in his title, takes to the center thread of the stream, does not apply in this State to the case of a lake or a pond."

Noyes *vs.* The Board of Supervisors, 104 Iowa, 175.

Again, on this same question, the supreme court of Iowa, in a case involving the title to 800 acres of land embraced within the meander lines of what is known as Owl lake, said:

"We are quite ready to assume, as a general proposition, that title to all the lake beds in the State, especially those

of navigable lakes, is in the State, and that the General Government never had any control or ownership thereof—but when, how, and by whom is the question of whether the land is a lake bed is to be determined—there seems to be no doubt that the Secretary of the Interior had the right, in so far as the parties to this suit are concerned, to determine the question as to whether or not the land in question was a part of the lake bed, or was covered by the so-called swamp-land act—what force is to be given to the determination of the Land Commissioner that the land was in fact swamp land, and what effect is to be given to the patent issued to the State?—but when there is a fair dispute as to the character of the land when originally surveyed, surely the Land Department has the right to determine the dispute, and as a general rule its decision is binding until set aside by direct attack."

Rood *vs.* Wallace, 109 Iowa, 8.

Another case is that of Carr *vs.* Moore, involving the title to the bed of what is known as Iowa lake. The evidence in that case disclosed that Iowa lake was meandered in 1849, when the Government survey of the township wherein it was situated was made; that the plaintiff Carr owned two lots platted by the surveyor as bordering on this meandered lake. The plaintiffs asked that the whole bed of the lake be decreed as owned in common by the adjoining proprietors in proportion to the extent of their assumed shore line, or that by lines running from the intersection of their boundaries with such assumed shore line to some point which may be found to be the center of the lake, portions of the lake bed to be set off to them in severalty. The defendant claimed title under the swamp-land grant. The supreme court of Iowa found that, while the lake was from three to six feet deep at the time of the original survey, there was no lake, in the proper sense of the word, upon which to base the meander line, and denied the plaintiffs' title to the bed of the lake as a riparian owner.

We now call attention to a recent statute passed by the legislature of the State of Iowa, in which the State assumes

to own the title to the beds of all meandered lakes within the State (chapter —, Acts 30th G. A. Iowa).

"SECTION 1. Survey and Sale Authorized.—The executive council of the State is hereby authorized and empowered to survey the meandered lakes and lake beds within this State, and sell the same as hereinafter provided, and to determine what lakes shall be maintained as the property of the State and what meandered lake beds belonging to the State may be drained, improved, demised or sold.

"SEC. 2. Signed Statements—Survey—Report.—Upon the presentation to the executive council of the statement signed by not less than fifty (50) freeholders, twenty of whom shall be actual residents of the township or townships in which said lake or lake beds are situated, or any county that any meandered lake or lake bed in such county is detrimental to the public health or the general welfare of the citizens of the county, and that it is unwise to maintain such meander lake or lake bed as a permanent body of water, and that the interest of the State will be subserved by draining and improving such lake bed, the governor shall, within thirty (30) days after the receipt of such statement, appoint a competent engineer who shall at once examine the situation and condition of such lake or lake bed, make a survey and plat thereof, and ascertain whether its location is such that it can be drained and improved, and make a full report to the executive council of the area and depth of water in the lake and of its general physical condition, which report shall be accompanied by his plat, field notes, and profile of his survey."

"SEC. 3. Hearing—Commissioner—Notice.—Upon receipt of the report of the engineer, the executive council shall determine whether such lake or lake bed shall be maintained and preserved as the property of the State, or whether the same shall be drained, improved and the land included within the meander lines thereof sold in the manner hereinafter described."

FEDERAL QUESTION.

Is there a Federal question involved in this case?

The only question contended for by the plaintiff in error is that the supreme court of Iowa limited the title of the land

his grantor obtained under his patent from the United States to ninety-nine and eighty one-hundredths acres, the amount of land described in said patent.

There were three decisions the supreme court of Iowa could have rendered:

First. That the plaintiffs' land on the north was bounded by the meander line.

Second. That the plaintiffs' land on the north was bounded by the shore line of the lake.

Third. That the plaintiffs' lots on the north were bounded by the half section of line.

There was no dispute in the pleadings or evidence as to the title to the 99.80 acres. The dispute was one of boundary. It was a question where the north line of plaintiffs' lots was located—a question purely of boundary; and there is no question in this case involving in the slightest degree the acts of Congress or the laws of the United States under which plaintiff's grantor obtained his title to lots 2 and 3. In this connection we call attention to the language of a decision of this court, as it so aptly and conclusively expresses the crucial point involved in the plaintiff in error's contention:

"This court has repeatedly held that it does not warrant the review of an adjudication upon a mere question of boundary. The fact that the land to which the boundary relates is held by a title derived from an act of Congress does not change the result. If the title be admitted, as recognized by the act, its location upon the boundary is a subject wholly within the cognizance of the State tribunals, and it is not within the power of this court to review their action.

"The supreme court of Louisiana construed correctly the several acts of Congress. The errors, if any were committed, were in locating it upon the land, and in fixing the boundary. No act of Congress was drawn in question."

Lanfear *vs.* Hinley, 4 Wall., 209.

If a Federal question is presented in the record of this case, then every cause involving the title to real property where the litigants derive title under and by virtue of a law of the United States and wherein their right to the land was denied by a State supreme court could be reviewed by the Supreme Court of the United States regardless of the questions decided by the supreme court. As we understand it, the rule is that it is only where the statute under which the party received his title from the Government of the United States must be construed and passed upon that the Federal question is raised, not in a cause such as the one at bar, where no question is made or no construction is necessary of the act under which the plaintiff in error obtained his title, the only question being the extent of the boundaries of that title. We again quote from a decision of this court:

"It is a mere question of boundaries between two neighbors. * * * It is a question of fact depending on monuments to be found on the ground, documents in the Land Office or the opinion of expert surveys; * * * if the accident of the controversy that both parties claimed title under the United States should be considered as sufficient to bring it within our jurisdiction then every controversy involving the title of such lands, whether it involves inheritance, partition, devise or sale may with equal propriety be the subject of examination by this court."

Moreland *vs.* Page, 20 Howard, 523.

The jurisdiction of this court to consider this case involves the following questions:

First. Is there a Federal question involved and has the decision of the Federal question, if any is involved, been against the validity of a treaty or statute or an authority exercised under the United States? Has the decision been in favor of the validity of a statute of or an authority exercised under the laws of the State of Iowa, which statute or authority is repugnant to the Constitution, treaties, or laws of the

United States, or has the decision been against any title, right, privilege, or immunity specially set up or claimed by plaintiff in error under the Constitution or any treaty or statute of or commission held or authority exercised under the United States? If the answer to these questions is in the negative, such answer ends this case.

Second. Could the case have been decided by the supreme court of Iowa without regard to the Federal question? If the answer to this question is in the affirmative, it likewise ends this case.

"Whenever the power to enact a statute, as it is by its terms, or is made to read by construction, is fairly open to denial and denied the validity of such statute is drawn in question but not otherwise."

Baltimore and Potomac R. R. Co., 130 U. S., 224.

"The validity of the authority must have been drawn in question directly and not incidentally. The validity of a statute is not drawn in question every time rights claimed under such statute are controverted nor is the validity of an authority every time an act done by such authority is disputed. The validity of a statute or the validity of an authority is drawn in question when the existence or constitutionality or legality of such statute or authority is denied and the denial forms the subject of inquiry."

United States *vs.* Lynch, 137 U. S., 285.

See also Cook County *vs.* Calumet and Chicago Land Company, 138 U. S., 653.

The question of the validity of the statute under which the plaintiff in error claims his title is not in question in this case. It is only a question of fact as to the boundaries of the land the plaintiff in error secured under that statute; that question of fact could be and was determined by the supreme court of Iowa without regard to the Federal question. We now call attention to the decision of this court in the case of Sweringen *vs.* City of St. Louis, 185 U. S., 45, which case is very similar as to facts and legal questions as is the case at bar. In that case

the plaintiff in error, being the plaintiff below, obtained a judgment in the State circuit court of the city of St. Louis for the recovery of certain lands. Upon appeal the supreme court of the State of Missouri reversed the judgment of the circuit court and the plaintiff in error brought the case to this court by writ of error. The property was bounded on the east by the Mississippi river, the question involved in the case was whether plaintiff was entitled to the alluvium caused by the recision of the Mississippi river by virtue of a patent from the United States. The trial court held she was; the supreme court held she was not. In the patent of the United States conveying the land in controversy to plaintiff's grantor, the boundary lines of the land granted were described. It appeared in evidence that at the time patent was executed that the east boundary of the land described in the patent was several hundred feet west of the waters of the river, that at the time of the trial such boundary was 1,500 feet west of the waters of the river. The plaintiff in error brought her suit of ejectment against the city of St. Louis; the city was using the land brought into existence by the recision of the waters of the Mississippi river as a public wharf. A motion was made in this court to dismiss the writ of error for lack of jurisdiction based upon the averment that there was no Federal question involved. In passing upon this motion the Supreme Court said:

"In our judgment there is no Federal question arising by reason of plaintiff's claim under the patent put in evidence by her as the source of her title to the land in question. With reference to the first clause of section 709 of the Revised Statutes, it appears plainly that the validity of the patent has never been questioned. Nor has the validity of any treaty or statute of, or authority exercised under the United States, been drawn in question. It is a pure question of the construction of the language used in the patent. Whether the land granted therein reached the waters of the Mississippi river on the east, or whether, according to the courses and distances con-

tained in the patent, the eastern limit of the land conveyed was some hundreds of feet west of the river. It was really a question of facts as to how far east the measurements of the courses and distances carried the boundary. There was no contention made as to the authority of the Government to convey the land to the bank of the river where the water was actually flowing, if it choose so to do."

Sweringen *vs.* St. Louis, 145 U. S., 45.

In the case at bar we have the plaintiff in error claiming title to the land in controversy under and by virtue of a patent issued under the laws of the United States pertaining to the disposal of public lands known as the homestead law. The defendant in error, Richard T. Ryan, claiming a right to secure a patent from the United States under the same law and by virtue of his settlement upon the land and the allowance of his homestead entry. The defendants in error, Palo Alto County and W. L. Hemphill, claiming a portion of the land in controversy under and by virtue of the swamp land grant of September 28, 1850, and patents issued by the United States under that grant. It is not denied but what each and every law just mentioned was valid. We are not called upon to consider for one moment the validity of either statute. We are not called upon to consider its existence or its constitutionality or to determine its import or in any manner to interpret either of these laws. The one question involved in this case is the boundary line between the land patented to Anthony the grantor of the plaintiff in error and the land patented to the State of Iowa under the swamp-land grant claimed by the defendants in error Palo Alto County and W. L. Hemphill, and the land embraced in the defendant Ryan's homestead entry.

As to the 8th and 9th assignments of error made by the plaintiff in error, we suggest that it is not competent to attack the decision of the Secretary of the Interior and the acts of his subordinate officers in relation to the survey of the

public domain in a collateral proceeding. The Secretary of the Interior is vested with wide discretionary power in reference to the determination of the character of land and of surveys of the public land. When he has decided, his decision is binding upon the courts, at least to the extent that they cannot be set aside and held for naught in a collateral attack.

Could the case have been decided by the supreme court of Iowa without regard to a Federal question? If so, this court is without jurisdiction. The answer to this question is found in the decision of the Supreme Court. We have not set out for the purpose of this motion the record of the vast array of testimony produced in the trial of this case and considered by the supreme court on the question of fact as to whether there was a body of water upon which to base the meander line of plaintiff's lots. If there was in fact no body of water north of plaintiff's lots which could properly be meandered, then there is absolutely nothing upon which to base plaintiff in error's contention of riparian ownership. Days were spent in the trial court taking testimony of witnesses as to the so-called body of water designated as Mud lake. Expert surveyors were employed on both sides of the controversy. Scores of levels were taken on the land. Lines were run, maps introduced, old settlers were brought in to testify as to the volume of water upon said land, and after considering the entire case on this question of fact and announcing the rule in Iowa as to riparian ownership, the supreme court of Iowa said:

"We have then to determine whether there was a body of water in section 30 proper to be meandered. As to what bodies of water should be meandered see Lester's Land Laws (edition 1860), 714. We do not intend setting out the testimony on this point. It is quite voluminous and very conflicting. From a careful reading of it we reach the conclusion there was no such body of water. That there was swampy and low land in section 30 north of plaintiff's lots admits of no question, and in wet

seasons doubtless a large part of it was covered at times with water, but we are equally clear that no permanent body of water of any considerable extent existed there."

Thus we have a question of fact as to the character of land decided by the supreme court of Iowa which is absolutely conclusive of the entire matter. Even had we attacked the law under which the plaintiff claimed his title, and it was necessary to construe that law, yet if the supreme court of Iowa could have determined the matter without regard to that question, having been raised, then our inquiry is ended, and such a determination becomes a finality; but we have no such question. The law under which plaintiff claims his title is not to be construed; it is not attacked; his rights under the law are not denied; and so for both reasons discussed herein we submit the plaintiff has no standing in this court.

In conclusion we submit that the questions involved in this case and decided by the supreme court of Iowa against this plaintiff were: First, a question of fact in which it was found that there was no body of water north of plaintiff's lots upon which to base the meander line as run by the original surveyor. Second, that the distance between the meander lines of plaintiff's lot and the water line of the alleged lake was so great and the land lying between said water line and meander line was so much that the plaintiff could not, under the laws of Iowa, be possibly construed a riparian owner. Third, that the statutes of limitations of Iowa will not run against the grantees of the Government of the United States under the the swamp-land grant before the land has been surveyed or selected. Neither of these three questions involves a Federal question or a question which confers jurisdiction upon this court

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Clerk.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

No. 176

GEORGE SCHLOSSER, PLAINTIFF IN ERROR.

vs.

W. L. HEMPHILL, RICHARD RYAN, AND PAIO ALTO COUNTY, IOWA.

Index and Point Brief for Defendants in Error

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INDEX BRIEF.

Plaintiff below, being the plaintiff in error here, by virtue of a patent issued by the United States under the Homestead Law, to plaintiff's remote grantor now owns lots 2 and 3 of section 30, township 97, range No. 34, Iowa.

The patent and all subsequent deeds give the number of acres in lots 2 and 3 as 99.80 acres.

There is no question or dispute as to the title of the 99.80 acres embraced in lots 2 and 3, and it is in the plaintiff.

The plaintiff's lots 2 and 3 lie along the south part of the south half of section 30 (Record, page 11).

The land in controversy is over 200 acres of land situated on the south half of section 30, lying north of plaintiff's lots 2 and 3.

The plaintiff claims this land as a riparian owner, claiming the north line of his lots 2 and 3 is a meander line, run with reference to a lake existing on section 30.

The defendants in error claim that the north meander line of plaintiff's lots 2 and 3 "were not run with reference to a lake then existing in part upon section 30." (Record, page 2.)

The defendants further claim that all the land in controversy is a part of 1,230 acres of land omitted from the original government survey, and that the land was thereafter surveyed under direction of the Secretary of the Interior in the spring of 1898, and was opened to entry at the United States Land Office at Des Moines, Iowa, on the 30th day of August, 1898. (Record, pages 3 to 6, inclusive.)

The defendant, Ryan, claims lots 12 and 13 of section 30, being 101.15 acres of the land in controversy, as a homestead, entered by him on the 30th day of August, 1898, at the United States Land Office in Des Moines, Iowa. (Record, pages 3 to 5, inclusive.)

The defendants, Palo Alto County and Hemphill, claim lots 11, 14 and 15 of section 30, being all the land in controversy (except lots 12 and 13 claimed by Ryan), under a swamp land patent issued by the United States to the State of Iowa and from the State of Iowa to Palo Alto County, both of which patents were issued in 1898. (Record, page 96, Ex. 44 and 45.)

THE PLEADINGS.

Petition	Record	1-2
Answer Defendant Ryan	"	2-5
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Amendment to Answer Ryan..... " 8-
Reply Plaintiff..... " 8-9
Amendment to Ans. Hemphill and Palo Alto Co. " 9-10

WAS THERE MISTAKE AND FRAUD IN THE ORIGINAL SURVEY AND WAS THE MEANDER LINES AS RUN ON SECTIONS 19-20-29 AND 30 RUN WITH REFERENCE TO A LAKE?

(Grant vs. Hemphill, 92 Iowa, 218.)

Testimony of Surveyor Moore.....Record 34-39
Testimony of Surveyor Painter ..... " 41-43
Testimony of Surveyor Painter..... " 53-56
Testimony Banfield..... " 47-52
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Decision Iowa Supreme Court..... " 125
For decision of the above question see defendants in error brief, pages..... 9-12
And decisions of Sercetary discussing the facts, pages 21 to 23 inclusive, also page ..... of this Index Brief.

The defendants now call attention to a number of assertions and statements made by counsel for plaintiff as to certain alleged facts, which statements are not born out by the records.

Plaintiff's counsel states that there was a lake to the north of plaintiff's lots, that this is conclusively proven. That the original field notes prove it and they are not contradicted.

The question of whether there was a lake north of plaintiff's lots has been judically determined in two cases by the Supreme Court of Iowa and by two decisions of the Secretary of the Interior, each decision holding there was no lake.

Grant vs. Hemphill, 92 Iowa, 218. Record page No. 3, bottom. Defendants' Brief, page 10. bottom.

Secretary's Decision, March 8, 1898. (Record 74 Ex. 25.)

Secretary's Decision June 25, 1898. (Record 75 Ex. 26.)

Schlosser vs. Hemphill. (Record 126 to 129, case at bar.)

We maintain that the decisions just cited are conclusive on this question of fact. We further claim that the evidence in this case establishes the fact that there was and is no lake lying north of plaintiff's lots. The following witnesses called by plaintiff to establish his contention that a lake in fact existed gave testimony of a persuasive character against plaintiff's claim.

JAMES SPAULDING.

Known the land since 1872, "I dont call this lake along the east side of Section 30 on map Exhibit G, it has always had grass on it ever since I have been there." (Record p. 17) His testimony relates to lots 11 and 15 of the land in controversy (See Plat P. 73 Record)

FRANCIS FITZGERALD.

"The entire bed of Mud Lake was dry seven years ago, they tried to put flax in there, but it was drowned out." (Record p. 22 top)

NICHOLAS RICE.

"The eastern portion of the half section was generally covered with water in the spring but receded toward fall. The lake went dry one or two years. The last six or seven years there has been no water on the south half of section 30 in the fall or middle of the summer. When the snow goes off and the spring rain comes there would be water there." (Record, page 20, bottom; page 24, top.)

JOHN CROOKSHANK.

"Have known Mud Lake since 1868. One summer all of Mud Lake was dried up. * * * The deepest hole in Mud Lake is in Clay County across the line, it is quite deeper than in section 30, the marsh or inlet lies up through the north half of section 30. * * * * * The east 80 of the south half of section 30 dried up more than half the time, no material difference between the east half and the rest of section 30 * * * * I think it could have been mowed and pastured in 1850 if it was a dry season. * * * * * I made affidavit for Mr. Barber, that the only lake here is Lost Island Lake, the statement is true (Record, pages 25 to 28)."

Reference to defendants' plat, Exhibit 2, page 73, of record, will disclose the fact that the "inlet" mentioned by plaintiff's witness, Crookshank, runs through the north half of section 30.

Defendants' witnesses gave testimony on the questions as to whether there was a lake north of plaintiff's lots as follows:

S. BANFILL.

Owned a farm in section 24, township 97, range 34, being the section northwest of land in controversy. "I lived there seven or eight years from 1871, bought wood of Anthony and used to go across and chop and haul wood. * * * * * There was a postoffice at Anthony's and I would go there to get my mail * * * * * Am familiar with that part of the land designated on Exhibit 2 as a marshy pond, called Mud Lake. In the fall of 1871 it was nearly dry. You could not see any water in Palo Alto

County. * * * * * Several years the marshes dried so you could go over them, that was between 1871 and 1879.

"The rise and fall of water in Trumbull Lake would not necessarily affect the water in Mud Lake; Mud Lake is higher. In the spring of the year after the snow melted the creek had water in it. In dry seasons in the summer it dried up so that cattle could not get water; the average summers the water dried up in the creek. If there was a ditch cut from Mud Lake to Trumbull Lake it would drain all the water out of Mud Lake. The distance between the two is about a half mile, and a ditch between the two would have drained Mud Lake during the years I was there. There was a large body of land up there known as the unsurveyed land." (Record, pages 47 to 51.)

J. T. PAINTER.

Q. I will ask you if at the time the township and range line was run in 1855 between 34 and 35, was it run through what is known as Mud Lake?

A. According to the field notes it was measured through; they did not offset as they did at Lost Island. (Record, page 54, bottom.)

EDWARD BEATTY.

"Live in Lost Island township, Palo Alto County, section 19. I am acquainted with Exhibit No. 2, and the land embraced in it. I have had in cultivation lot 8 of section 30, township 97, range 34. It was in 1895. I sowed it to flax about the last of May I think it was. I have known the land since 1890.

"I had my flax on lot 8 and part of lot 7; had in about 50 acres. There was no sod there. I called it the bottom of a marsh. It produced very little flax. I did not harvest it; it did not mature in the fall and the weeds took it. No water got on it. It would not have been worth cutting." (Record, pages 57 and 58.)

HIRAM DAVIS.

"I live at Milford, Dickinson County; have lived there some 36 years. Came to this country thirty-six years ago last June.

I was at lost Island and Mud lakes the next July on a hunting excursion. There was some four or five of us. We were there nearly a week. We were on the island at that time; walked over from the south side. We were camped on the isthmus between Lost Island and the lake. We took a notion to go over and explore the island, and walked over. I was shown the other day where Mr. Schlosser's house is. We camped on the premises north of Anthony's, and walked over from there to the island."

Q. What was the condition of the low land at that time?

A. We considered it a slough—a rush slough. We used to call it the Lost Island slough; grass, rushes, vegetation of different varities growing there. Old grass on the ground under the fresh grass. The sod was thick and heavy. We could drive right across it with a wagon at that time. We drove about half way from the island beyond Schlosser's house down across to the timber point with a pair of mules and a heavy wagon. Near to and east of the island and point the land was very near the same, a little more water on the north side than the other. I think there was bigger rushes and more grass.

Q. That is now called Mud Lake? What was the condition of that?

A. There was not much water on the point of it; but after we come down to where the county line is below that there appeared to be more water. There was not so much grass and rushes down there.

Q. What is the fact as to whether there was grass and rushes all over it, or not?

A. Why, we supposed that there was nothing but grass; just a slough, rat houses occasionally where there was enough water to make one or to have one. It is a very uneven piece of land—rolling; kind of mounds and sags in it.

Q. You mean that piece represented as a lake?

A. Yes, sir; up through there.

Q. What was the appearance of that place at that time as to whether there was a lake there or not?

A. We didn't consider any lake in there.

We didn't consider it a regular lake. We didn't consider that in the lake grass and rushes would grow to that extent. They were growing very nearly all over it. It was a good place for ducks and geese. We camped a little south of what has been designated as the "point." There was quite a high raise there, and we camped right on the bank of the slough. I next saw the ground about October of the same year. It was in very nearly the same condition then; perhaps a little wetter, or perhaps a little drier. I could not recollect; we had so many bad places and sloughs them days to contend with. I was teaming, moving trappers, drawing freight from Ft. Dodge, Webster City and Des Moines. (Record, pages 68 and 69.)

See also on this point Barber Plat, record page 73, and field notes, record pages 80 and 81. Also Secretary's Decision, record pages 74 and 75.

Counsel states: "That there was a lake to the north of the lots at the time of the government surveys in 1855 and 1857, and that it remains there today is conclusively shown. (See decision Commissioner appendix, page 5, for full description of lake.)"

The Commissioners' Decision cited was made in 1894, was not appealed from, has since been repudiated by the defendant. (See Secretary's Decision, record pages 74 and 75.)

THE NEW SURVEY.

1. Has the Secretary of the Interior authority to inquire into the facts for the purpose of determining whether a mistake was made in a government survey?

2. If the Secretary of the Interior has the power to inquire into the facts, has he the authority to determine the question of

whether a mistake was made; and if he has such authority, has he authority to correct such mistake and to resurvey lands improperly omitted from the original survey?

3. If the Secretary of the Interior has authority to inquire into the facts and determine whether a mistake has been made in a survey, and has the authority to correct such mistakes if he finds one has been made, and has the authority to resurvey lands improperly omitted by the first survey, what effect does his action in determining that a mistake did exist and in correcting the mistake and in surveying the land omitted by the original survey have upon the question of jurisdiction of the courts.

The above questions are discussed in defendants' brief, pages 14 to 41, inclusive.

The decisions of this court fully and completely answer the first two of above questions in the affirmative, and in every case where the Secretary had determined (as a fact) that there was in the original survey a mistake and has corrected that mistake by a new survey, his actions have been upheld by this court.

Cragin vs. Powell, 128 U. S., 691 (L. C. P., 32, 566).
Michigan L. L. Co. vs. Rust, 168 U. S., 589.
New Orleans vs. Payne, 147 U. S., 361.
Niles vs. Cedar Point Club, 175 U. S., 299 (44, 171).
Shepley vs. Cowan, 91 U. S., 330 (23, 424).
Moore vs. Robbins, 86 U. S., 530 (24, 848).
U .S. vs. San Jacinto Tin Co. 125 U. S., 272.
Minter vs. Crommelin, 18 How. (U. S.), 87.
Colorado Coal Co. v. U. S., 123 U. S., 307.
U. S. vs. San Jacinto Tin Co., 125 U. S., 273.
Stringer vs. Young, 3 Pet. (U. S.), 273.
U. S. vs. Marshall Silver Mine Co., 129-579.
Patterson vs. Jenke, 2 Pet. (U S.), 216.
U. S. vs. Maxwell Land Grant Co., 121 U. S., 325; 122 U. S., 365.
Colorado Coal Co. vs. U. S., 123 U. S., 307.

U. S. vs. Atherton, 102 U. S., 372.
Vance vs. Burbond, 101 U. S., 514.
U. S. vs. Hancock, 133 U. S., 193.

The defendants' title is evidenced by a patent issued by the United States for lots 11, 14 and 15 (Record, page 96), and by Homestead entry certificate (Record, page 5). These records amount to a decision of the Secretary of the Interior that lots 11, 14 and 15 are swamp and overflowed land, that lots 12 and 13 are agricultural land. These facts and defendants' title cannot be assailed in a collateral proceeding, and oral testimony impeaching these records is inadmissable.

Knight vs. U. S L., Association, 146 U. S., 116.
Defendants' Brief, 36-38.

As to the title to lake beds in Iowa see defendants' brief commencing last paragraph on page 38, bottom of page 41, and cases therein cited.

For discussion of point that there is no Federal question see defendants' motion to dismiss writ of error and cases therein cited.

The courts have no power to make surveys or correct mistakes, but may determine as was done by the Supreme Court of Iowa, that a mistake was made.

Grant vs. Hemphill, 92 Iowa, 218.

When the Secretary of the Interior rendered his decision on March 18, 1898 (Record, page 74), deciding that an investigation be made to determine whether a mistake had been made, he had before him the decision of the Supreme Court of Iowa in the case of *Grant vs. Hemphill*, holding there had been a mistake, he had the evidence that the surveyors who made the original survey were drunk and unfit for duty while making the survey. He had before him the evidence of County Surveyor Painter that the meander lines as run could not have been run by actual measurements on the ground, but were run on paper only, he had had the evidence of Painter that instead of there being a lake on

sections 19-20-29 and 30, the land was from 16 to 41 feet above the high water level of the slough known as Mud Lake, situated in Clay County in section 25, township 97, range 35.

With this array of facts before him ought the Secretary to have ordered the investigation when the truth of each assertion was established by his investigation? Ought he to have approved, as he did, the Barber survey?

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